TEOH TIAN LAI

v.

PP

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
MOKHTAR SIDIN JCA
ABDUL KADIR SULAIMAN JCA
[CRIMINAL APPEAL NO: P-09-14-96]
28 NOVEMBER 2000

CRIMINAL PROCEDURE: *Appeal - Grounds of - Calling of defence - Whether such ruling finally disposed of rights of accused - Whether ruling appealable - Criminal Procedure Code, s. 305 - Courts of Judicature Act 1964, s. 50(1)*

The appellant was charged under the second limb of s. 304 of the Penal Code. The Sessions Court acquitted him at the close of the prosecution's case. In an appeal against that order to the High Court the prosecution succeeded and the defence was ordered to be called. The appellant returned to the Sessions Court and gave evidence. Without undertaking a review of the prosecution's case, the Sessions Court considered only the defence and convicted the appellant. The appellant's appeal to the High Court was dismissed, on the basis that the appellant had not appealed against the order of the High Court allowing the public prosecutor's appeal against the Sessions Court's acquittal of the appellant without calling for the defence. The appellant appealed.

Held:
Per Gopal Sri Ram JCA

[1] If at the end of the prosecution's case the court finds that there is a *prima facie* case against the accused, the court has no other option but to call upon the accused to enter on his defence. The accused will then be under an obligation to submit to the order of the judge by making his defence in accordance with the provisions of the law. There is no room for the accused to avoid the issue of presenting his case – he must comply.

[2] The decision of the High Court ordering the appellant to enter on his defence was a ruling that did not have the effect of finally disposing of his rights. It was not a final order and hence not appealable under s. 305 of the Criminal Procedure Code or s. 50(1) of the Courts of Judicature Act 1964.

[3] The High Court judge was therefore wrong and his decision had occasioned a miscarriage of justice.

[Appeal allowed; conviction quashed; sentence set aside.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Perayu telah dituduh di bawah bahagian kedua s. 304 Kanun Keseksaan. Mahkamah Sesyen telah melepaskan beliau pada penyelesaian kes pihak pendakwaan. Satu rayuan telah dibuat terhadap perintah itu kepada Mahkamah Tinggi. Pihak pendakwaan telah berjaya dan pembelaan telah diperintahkan supaya dipanggil. Perayu telah kembali ke Mahkamah Sesyen dan memberi keterangan. Tanpa menjalankan satu kajian semula bagi kes pihak pendakwaan, hakim Mahkamah Sesyen hanya mempertimbangkan pembelaan dan mensabitkan perayu. Rayuan perayu kepada Mahkamah Tinggi telah ditolak, atas dasar bahawa perayu telah tidak merayu terhadap perintah Mahkamah Tinggi yang membenarkan rayuan pendakwa raya terhadap pembebasan perayu oleh mahkamah perbicaraan tanpa memanggil pembelaan. Perayu kini merayu.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Jika pada penutupan kes pihak pendakwaan mahkamah mendapati bahawa adanya kes prima facie terhadap tertuduh, mahkamah tiada pilihan lain tetapi meminta tertuduh memasukkan pembelaannya. Tertuduh akan kemudiannya berkewajipan untuk berhujah kepad hakim dengan membuat pembelaannya menurut peruntukan undang-undang. Tidak terdapat ruang bagi tertuduh mengelak dari isu mengemukakan kes beliau – beliau terpaksa mematuhinya.

[2] Keputusan Mahkamah Tinggi memerintahkan perayu memasuki pembelaannya tidak mempunyai kesan yang akan akhirnya melupuskan haknya. Ianya bukan satu perintah yang muktamad dan oleh itu tidak boleh dirayui di bawah s. 305 Kanun Prosedur Jenayah atau s. 50(1) Akta Mahkamah Kehakiman 1964.

[3] Hakim Mahkamah Tinggi telah salah dan keputusan beliau telah menyebabkan ketidakadilan.

[Rayuan dibenarkan.]

Case(s) referred to:
Gng Eng Hwoo v. R [1954] MLJ 256 ***(refd)***
Saad Abas & Anor v. PP [1998] 4 CLJ 575 ***(foll)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 3, 50(1)
Criminal Procedure Code, s. 305
Criminal Procedure Code (Straits Settlement), s. 296
Penal Code, s. 304

For the appellant - Karpal Singh (Jagdeep Singh Deo with him); M/s Karpal Singh & Co
For the respondent - Abdul Karim Abdul Jalil DPP

Reported by Mariette Peters-Goh

JUDGMENT

Gopal Sri Ram JCA:

The main ground in support of this appeal with which we are in agreement relates to the approach taken by the learned intermediate appellate judge in the present case.

The appellant was charged with an offence under the second limb of s. 304 of the Penal Code. The Sessions Court acquitted him at the close of the prosecution case. An appeal against that order to the High Court succeeded and defence was ordered to be called. The appellant returned to the Sessions Court and gave evidence in his defence.

The learned sessions judge, without undertaking a review of the prosecution case, considered only the defence and convicted the appellant. Being dissatisfied, the appellant appealed. In dismissing his appeal this is what Jeffrey Tan J said:

> This is the Appellant's appeal, **in form**, against his conviction and sentence. **In substance**, this appeal is against the trial court's rejection of his defence, as the Appellant having not appealed against the order of the High Court (not this Court) – allowing the Public Prosecutor's appeal against the trial court's acquittal of the Appellant without calling for the defence – ordering him to enter his defence to a charge under section 304 (2nd limb) of the Penal Code accepted that his defence was rightly called, and should have lodged an appeal against the order of the High Court, in view of Appellant counsel's submission in the instant appeal that the prosecution had not made out a case, if he was so dissatisfied that the prosecution had not made out a case against him.

This, in my judgment, is a serious misdirection as the order of the Court directing defence to be called was not a final order and hence not appealable under s. 305 of the Criminal Procedure Code or s. 50(1) of the Courts of Judicature Act 1964.

The point was considered by Whitton J in *Gng Eng Hwoo v. R* [1954] MLJ 256, where, when considering the equipollent s. 296 of the Straits Settlement Criminal Procedure Code, the following observations were made:

> It is clear then no appeal can lie unless the Magistrate in, to quote his own words, finding Tay Koon Tien was the owner as defined in section 30(7) at the material time made an order within the meaning of section 296. I have been unable to find any definition of the word "order" which appears to fit its use in this section, but my research into the matter has led me to the conclusion that in connection with a criminal cause or matter the word is confined, broadly speaking, to those decisions of a Court which affect parities to the proceedings in respect of their person or property. Now in holding Tay Koon Tien to be the owner of the boat the learned Magistrate did not in my view make anything in the nature of a conclusive order in relation to the boat. Had the case proceeded to a normal end the Magistrate then made an order of forfeiture it would be open, to the appellant to appeal as a person coming within the scope of section 30(2). But in such circumstances were the Magistrate not to make an order for forfeiture I do not think for one moment it could be successfully maintained that the magistrate's ruling as to ownership based on the highly artificial meaning given to the word "owner" in section 30(7) of the Dangerous Drugs Ordinance had affected the legal title in the vessel which existed before the proceedings were instituted in the Magistrate's Court.

The position since the amendment to s. 3 of the Courts of Judicature Act 1964 was dealt with by this court in *Saad bin Abas & Anor v. Public Prosecutor* [1999] 1 MLJ 129. I find it sufficient to quote from the headnote of the case:

> (1) If at the end of the prosecution case the court finds that there is a *prima facie* case against the accused, the court has no other option but to call upon accused to enter on his defence. The accused will then be under an obligation to submit to the order of the judge by making his defence in any way in accordance with the provisions of the law. There is no room for the accused to avoid the issue of presenting his case; he must comply. Further, there is no authority to support the proposition that an order of a court calling upon the accused to enter his defence can be stayed so as to allow the accused to file an appeal against that order on the ground that the finding of the court was grossly wrong in law and in fact;
>
> (2) The decision of the High Court in ordering the applicants to enter their defence was a ruling that did not have the effect of finally disposing of their rights. At the stage of making the order, it had no finality in its intent. This would only happen after a decision had been made at the close of the defence. Only then will there be a decision to 'affect the event of the appeal'; *Au King Chor & Ors v. Public Prosecutor* [1985] 1 MLJ 216 distinguished.

In view of these principles, we are satisfied the learned judge was entirely wrong in the views he expressed. His decision has occasioned a serious miscarriage of justice warranting the interference of this court. Therefore, we allow the appeal, quash the conviction and set aside the sentence. All other ancillary orders are rescinded and the accused is set at liberty.

My learned brothers Mokhtar Sidin and Abdul Kadir Sulaiman JJCA, concur with this judgment.